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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JEROME EUGENE MCMURPHY,<br>Defendant and Appellant. | A143460<br><br>(Mendocino County<br>Super. Ct. No. SC-UK-CR-PA-14-0079057-002) |

## INTRODUCTION

The superior court heard this parole violation case pursuant to the provisions of the Criminal Justice Realignment Act of 2011 (Pen. Code, § 3000.08, subd. (f)) and found defendant Jerome Eugene McMurphy in violation for possessing drug paraphernalia and pornography. Defendant does not take issue with the drug paraphernalia finding, but maintains the pornography finding must be reversed. He contends the special condition—prohibiting him from "view[ing], possess[ing], or hav[ing] access to any pornographic material"—is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and even if it is not, is unconstitutionally vague and overbroad.

In her respondent's brief, the Attorney General asserted defendant had "waived" his *Lent* challenge "because he failed to raise the challenge either at the time the condition was imposed or at the time the notice of a probation violation was filed." Any challenge at the time the special condition was imposed would have been by way of administrative appeal as provided for by Board of Parole Hearings regulations—thus,

what the Attorney General appeared to be claiming was that defendant failed to exhaust his administrative remedies. In supplemental briefing requested by this court, the Attorney General maintained she was not "specifically" making that argument. Rather, after pointing out defendant not only failed to challenge the condition when it was imposed but also at two prior parole violation hearings, she maintained that "[s]ignificantly" he also failed to challenge the condition "until after the court sustained the violation."

We consider the Attorney General to have abandoned her suggestion defendant is barred from raising a *Lent* challenge for failing to exhaust his administrative remedies and to have clarified that her position is that defendant failed to timely or adequately raise the issue in the trial court and thus forfeited the issue on appeal. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*).) We agree defendant did not timely make a factually based *Lent* challenge. We further conclude that even if he had, the special condition is a reasonable condition of his parole.

The Attorney General has not advanced an exhaustion or forfeiture argument as to defendant's constitutional challenge, but maintains the language of the no-pornography condition is sufficiently clear. While no-pornography parole and probation conditions have been imposed for many years, the state of the law as to the specificity required is surprisingly unsettled both in the federal courts and in our courts of appeal. In fact, nearly all of the discussion of no-pornography conditions in our state appellate courts has taken place in nonpublished opinions, and the results vary widely, depending on the precise language of the condition, the position taken by the parties, and the particular authority the court found persuasive. However, we need not wade into this thicket. On this record, defendant cannot show any prejudice arising from the language of the special parole condition. He never disputed the materials in his possession were pornographic. On the contrary, everyone in the courtroom, including defendant, himself, unhesitatingly referred to the materials as adult "pornography." We therefore affirm the finding defendant violated special condition No. 49.

## BACKGROUND

After serving prison time for a felony hit and run (Veh. Code, § 20001), defendant obtained parole in April 2014. His prior offenses include two misdemeanor counts of annoying or molesting a child (Pen. Code, § 647.6) and one misdemeanor count of indecent exposure (Pen. Code, § 314, subd. 1). Defendant is classified as "a CDCR [(California Department of Corrections and Rehabilitation)] High Risk Sex Offender" with a "Static 99 assessment of 5." Accordingly, his parole is subject to a number of special conditions, including a prohibition (special condition No. 49) against "view[ing], possess[ing], or hav[ing] access to any pornographic material."[1] Defendant is further prohibited from possessing any narcotic or controlled substance or drug paraphernalia. Shortly after his parole began, defendant sustained violations for indecent exposure, and, after that, failure to register as a sex offender.

The instant revocation proceeding arose out of an incident on a September 2014 afternoon. Ukiah Police Officers Thomas Kiely and Chris Long observed defendant pacing back and forth in a parking lot. Defendant was talking to himself, twitching his neck, and waving his hands in the air. As Officer Kiely exited his patrol car, defendant walked towards a dumpster and began making quick movements, as though attempting to hide something. Kiely asked defendant to show his hands and to come out from behind the dumpster, which he did.

Kiely initially observed a few personal items behind the dumpster, including a binder, small carrying pack, and water bottle. After defendant consented to a search of his person and property, the officers also discovered a hypodermic syringe about two feet

[1] Defendant is also subject to special conditions prohibiting him from possessing or having access to "any sexually oriented or sexually stimulating objects and/or devices," from viewing, possessing, or having access to "any material; i.e., periodicals, newspapers, magazines, catalogs, that depict adults or children in undergarments, nude, partially nude, etc.," and from possessing or having access to "sexually oriented devices, handcuffs, handcuff keys, restraint equipment, or any other items that could be used for bondage."

from the other personal items. It contained five cubic centimeters of what was presumptively determined to be methamphetamine.

Kiely then opened the nearby binder and found "adult pornographic material." Unsure whether defendant was allowed to possess such material, Kiely booked the binder into evidence and contacted defendant's parole officer.

At the parole violation hearing, Kiely testified the pornographic material consisted of photos. When asked if they were "commercially made pictures, like from a magazine," Kiely answered, they looked "professional," and "off of the internet or from magazines." The material, itself, was neither shown to Kiely in court, nor offered into evidence. Defendant made no objection to Officer Kiely's testimony about the material, nor did he cross-examine Kiely about it.

Based on Officer Kiely's testimony, the trial court found defendant had been in possession of drug paraphernalia and pornographic materials, but found the evidence insufficient to support a finding he had possessed methamphetamine. The court ruled defendant had violated his parole and ordered him to serve the statutory maximum of 180 days in jail, with 25 days' credit for time served.

## DISCUSSION

### *Defendant's* Lent *Challenge*

#### *Forfeiture*

As noted at the outset, the Attorney General has effectively abandoned any failure to exhaust administrative remedies argument and, instead, is advancing a forfeiture argument. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889.) We agree defendant failed to timely make a factually based *Lent* challenge.

The record on this issue is as follows: Other than briefly cross-examining Officer Kiely about the methamphetamine allegation (the reporter's transcript is just slightly more than half a page), defendant presented no evidence at the parole violation hearing. Thereafter, after ensuring the court had a copy of defendant's parole conditions, the prosecutor rested. Defense counsel likewise told the court he had "Nothing, your honor."

The court then asked if there was "Any argument?" Defense counsel responded, "Yes, your Honor." The prosecutor stated she would "just respond." Defense counsel then submitted on the pornography allegation and argued only that the evidence was insufficient to find defendant in violation for possessing methamphetamine or drug paraphernalia. After the prosecutor responded, the court stated its was "not having any trouble drawing the conclusion" defendant was in "possession of the syringe or the pornographic material." Rather, the only concern it had was whether the evidence was sufficient to establish he also had methamphetamine.

After further brief argument on the standard of proof, the court stated: "All right. So I'm going to find that he's in violation of—." At this point, defendant interrupted asking if he could "say something." The court reminded defendant he was represented by counsel, and defense counsel stated he wanted to "clarify" that it was against his advice for defendant to say anything. The court took up the discussion, stating: "Also, the evidence is concluded. If you want to make a statement with respect to what should happen to you as a result of a violation, I'll let you do that." The court proceeded to state its findings on the record, including finding that "the violation 3 not to possess or have access to pornographic material is true."

After making its findings of violation, the court asked if anyone wanted "to address consequence at this point." Defendant then stated he did not think he had been adequately represented because there was a shoe by the syringe which he claimed was evidence he had not violated the no-drug paraphernalia condition. The court responded that even had the shoe been brought to its attention, it would not have found the syringe or the pornographic material "belonged to the shoes." Defendant then responded, referring to the pornographic material, "I had that on me." But he said, "I've never had any pornographer or pornography in my past ever. Yes, I do register for 290 for indecent exposure to a minor, which is 12 years ago. That had nothing to do with any kind of pornography." He further complained he was subject to other conditions: "I can't even go on an internet and go to a chess site. Why? Because it don't apply to my crime. But they still have a lot of conditions on me that don't apply to me." Observing that

defendant had four registrable misdemeanor offenses and he was subject to the special parole condition, the court turned to the issue of the consequences for the violations.

Given that defendant was represented by counsel, we focus first on counsel's conduct. Defense counsel did not take issue with the prosecution's evidentiary showing as to the pornography violation. And he made no argument that defendant had not violated that special condition. Rather, he submitted on the pornography allegation. In short, defense counsel raised no issues in connection with that allegation or with the finding that defendant had violated his parole by possessing pornographic materials. On this record, there is no question that defendant forfeited any factually based *Lent* challenge. (See *Sheena K., supra*, 40 Cal.4th at p. 889.)

Since defendant was represented by counsel, defendant was not entitled to make any remarks to the court. (See *In re Barnett* (2003) 31 Cal.4th 466, 471 [as general rule, represented parties must proceed through counsel].) Furthermore, defendant said nothing about the special no-pornography condition until *after* the evidence was concluded, *after* his counsel submitted, and *after* the court found him in violation. Even assuming defendant could act on his own behalf, his complaint about the special condition came too late in the day.

***The No-pornography Condition Is Reasonable Under* Lent**

Even if defendant had made a timely factually-based *Lent* argument, there is no question the special parole condition is, on this record, reasonable under *Lent.* "The fundamental goals of parole are ' "to help individuals reintegrate into society as constructive individuals" [citation], " 'to end criminal careers through the rehabilitation of those convicted of crime' " [citation] and to [help them] become self-supporting.' " (*In re Hudson* (2006) 143 Cal.App.4th 1, 9, quoting *In re Stevens* (2004) 119 Cal.App.4th 1228, 1233.) In furtherance of these goals, " '[t]he state may impose any condition reasonably related to parole supervision,' " including the state's " 'compelling state interest of fostering a law-abiding lifestyle in the parolee.' " (*In re Hudson,* at p. 9.)

"Parolees have fewer constitutional rights than do ordinary persons. (*Morrissey v. Brewer* [(1972) 408 U.S. 471,] 482.) 'Although a parolee is no longer confined in

prison[,] his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally.' (*People v. Burgener* (1986) 41 Cal.3d 505, 531, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 754, 756; see also *U. S. v. Knights* (2001) 534 U.S. 112, 119.)" (*In re Stevens, supra,* 119 Cal.App.4th at p. 1233.)

"There are, however, limits upon the parole authority's imposition of restrictions. Parole conditions, like conditions of probation, must be reasonable since parolees retain 'constitutional protection against arbitrary and oppressive official action.' (*People v. Thompson* (1967) 252 Cal.App.2d 76, 84.) Conditions of parole must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the parolee. (*In re White* (1979) 97 Cal.App.3d 141, 146.) Thus, a condition that bars lawful activity will be upheld only if the prohibited conduct either 1) has a relationship to the crime of which the offender was convicted, or 2) is reasonably related to deter future criminality. ([*Lent, supra,*] 15 Cal.3d 481, 486.)" (*In re Stevens, supra*, 119 Cal.App.4th at p. 1234.)

Since the no-pornography condition is not related to the hit-and-run driving conviction for which defendant is currently on parole, the pivotal question is whether it is reasonably related to deterring future criminality given defendant's prior sex crime convictions.

Defendant complains he was convicted of these misdemeanor crimes on the same date (they apparently arose from his conduct on a single day while visiting a shopping mall), and they were some 13 years old when he was paroled. It is not beyond the pale, however, for parole officials to conclude these somewhat dated crimes justify the no-pornography condition as an aid to defendant's leading a law-abiding life, particularly given his classification as "a CDCR High Risk Sex Offender due to his Static 99 assessment of 5" and his recent parole violation involving indecent exposure.

Defendant also complains the causal link between pornography and future sexual offenses "is questionable." This issue is, indeed, a matter of academic debate, but that does not render the state's position on the possession of pornography legally unreasonable. (See *Amatel v. Reno* (D.C. Cir. 1998) 156 F.3d 192, 199–200 [discussing

studies and upholding federal statute restricting distribution of pornography in prison as rationally related to rehabilitation]; see also *U.S. v. Bee* (9th Cir. 1998) 162 F.3d 1232, 1234–1235 [no possession of " 'sexually stimulating or sexually oriented' " material reasonably related to protecting public and deterring future criminal behavior]; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1437 (*Turner*) ["[p]reventing the possession of sexually oriented materials by [convicted sex offenders] promotes public safety and [the defendant's] rehabilitation"].)

The no-pornography condition therefore passes muster under *Lent.*

***Defendant's Constitutional Challenge***

Defendant also challenges the no-pornography condition on grounds it is unconstitutionally overbroad and vague. The Attorney General has not interposed exhaustion or forfeiture arguments as to these claims. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 888 [challenge to probation condition on grounds it was vague and overbroad raised pure questions of law and was not forfeited by failure to raise in trial court]; *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345 (*Pirali*) [appellate court "may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record"].)

As we observed at the outset, the state of the law as to the constitutional validity of no-pornography conditions is unsettled. (Compare, e.g., *U.S. v. Adkins* (7th Cir. 2014) 743 F.3d 176, 193–196 [striking condition barring defendant from viewing or listening to " 'any pornography or sexually stimulating material or sexually oriented material' " or patronizing locations " 'where such material is available' " as potentially applicable to innumerable public locales and even ubiquitous advertisements; court's conclusion was "generally consistent with our sister circuits' approaches in this challenging area"];[2]

[2] The circuit court remanded to the district court, acknowledging "the difficulty of drafting special conditions in this context," and provided a few suggestions on narrow tailoring. (*U.S. v. Adkins*, *supra*, 743 F.3d at p. 196.) "We therefore emphasize that various options remain open, including (1) defining the crucial terms in the existing

*U.S. v. Guagliardo* (9th Cir. 2002) 278 F.3d 868, 872 (*Guagliardo*) [striking condition banning the possession of " 'any pornography,' " including legal adult pornography, because "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography' "];[3] *U.S. v. Loy* (3d Cir. 2001) 237 F.3d 251, 261, 265 [striking condition banning the possession of " 'all forms of pornography, including legal adult pornography' "];[4] see *Farrell v. Burke* (2d Cir. 2006) 449 F.3d 470, 487, 498 [noting Second Circuit has "strongly suggest[ed] that the term 'pornography' is 'inherently vague' for defendants whose statute of conviction does not define it" and "hop[ing] that greater efforts will be made in the future to define adequately the terms of parole conditions dealing with pornographic materials," citing *U.S. v. Simmons* (2d Cir. 2003) 343 F.3d 72]; *U.S. v. Goodwin* (7th Cir. 2013) 717 F.3d 511, 524–525 [invalidating condition prohibiting possession of material that " 'depicts or alludes to sexual activity' "; term " 'alludes to' " was "particularly problematic"; "This dictate goes beyond a ban on the possession of pornography."]; *U.S. v. Wilkinson* (11th Cir. 2008) 282 Fed.Appx. 750, 752–755 [upholding condition that defendant not possess or have

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special condition in a way that (a) provides clear notice to Adkins (preferably through objective rather than subjective terms), (b) includes a mens rea requirement (such as *intentional* conduct), and/or (c) is not broader than reasonably necessary to achieve the goals of [federal sentencing statutes]; and (2) narrowing the scope of proscribed conduct, such as by (a) focusing on child pornography, which federal statutes objectively define, see, e.g., 18 U.S.C. § 2256(8), and/or (b) focusing on particular establishments such as strip clubs, adult bookstores, and adult theaters." (*Ibid.*; see *Smith v. State* (Ind.Ct.App. 2002) 779 N.E.2d 111, 118 [holding no-pornography condition vague and remanding "with instructions to set out any prohibition against 'pornographic or sexually explicit materials' with more specificity"; definition of " 'child pornography' " found in 18 U.S.C. § 2256(8) might be a useful tool, and trial court might prohibit defendant from possessing any materials falling under the state statutory definition of " 'obscene matter' "].)

[3] The circuit court remanded to the district court "to impose a condition with greater specificity." (*Guagliardo, supra*, 278 F.3d at p. 872.)

[4] The circuit court remanded for a "more tightly defined restriction on legal, adult pornography." (*U.S. v. Loy, supra*, 237 F.3d at p. 267.) "[P]erhaps one," suggested the court, that "borrowed applicable language from the federal statutory definition of child pornography located at 18 U.S.C. § 2256(8)." (*Ibid.*, fn. omitted.)

under his control " 'any pornographic, sexually oriented or sexually stimulat[ing] material or patronize any establishment where such material or entertainment is available"; because neither the Supreme Court nor 11th Circuit has addressed the constitutional issues and "other circuits differ in their holdings," defendant could not show "plain error"]; *U.S. v. Boston* (8th Cir. 2007) 494 F.3d 660, 667–668 [upholding against overbreadth challenge condition that prohibited viewing or possessing "any form of pornography, sexually stimulating or sexually oriented material . . . of any kind as deemed inappropriate by the probation officer and/or treatment staff" and precluding entry to "any location where pornography or erotica are the primary products for purchase or viewing"]; *U.S. v. Phipps* (5th Cir. 2003) 319 F.3d 177, 192–193 [upholding condition that prohibited possessing " 'sexually oriented or sexually stimulating materials' " and patronizing " 'any place where such material or entertainment is available' " by reading condition in a "commonsense way" and reading it to mean explicit materials available at sexually oriented establishments such as strip clubs and adult theaters or bookstores].)

Published California decisions have dealt only with no-pornography conditions tied to the dictates of a probation officer. In *Turner, supra,* 155 Cal.App.4th 1432, for example, the court considered a vagueness challenge to a probation condition that prohibited the defendant from possessing any " 'sexually stimulating/oriented material deemed inappropriate by the probation officer and/or patronize[ing] any places where such material or entertainment is available.' " (*Id.* at p. 1434.) The court found the phrase " 'sexually stimulating/oriented material deemed inappropriate by the probation officer' " an "inherently imprecise and subjective standard" and "not materially distinguishable from the probation condition in *Sheena K.* forbidding association with anyone disapproved of by the probation department." (*Turner,* at p. 1436.) To ensure the defendant had fair warning of what he could not possess, the court modified the condition to state defendant could " 'Not possess any sexually stimulating/oriented material having been informed by the probation officer that such material is inappropriate and/or patronize any places where such material or entertainment in the style of said material are

known to be available.' " (*Ibid*.; accord *Pirali*, *supra,* 217 Cal.App.4th at p. 1353 [relying on *Turner*, court concluded "[m]aterials deemed explicit or pornographic, as defined by the probation officer" was an "inherently subjective standard that would not provide the defendant with sufficient notice of what items are prohibited" and modified condition to order the defendant " 'not to purchase or possess any pornographic or sexually explicit material, having been informed by the probation officer that such items are pornographic or sexually explicit' "]; see *People v. Moses* (2011) 199 Cal.App.4th 374, 377, 381 [defendant not to " 'own, use, or possess any form of sexually explicit movies, videos, material, or devices unless recommended by the therapist and approved by the probation officer' " and not to " 'frequent any establishment where such items are viewed or sold' " or " 'utilize any sexually oriented telephone services' "; court did not agree the word " 'devices' in the context of sexually explicit material is vague," but added " 'know or reasonably should know' " to the establishment and telephone services provisions].)

The instant case differs from *Turner* and *Pirali* because the parole condition is not tied to an "appropriateness" determination or "definition" supplied by a parole officer. Rather, the challenged condition simply provides that defendant "shall not view, possess, or have access to any pornographic material; i.e., movies, photographs, drawings, literature, etc." As we noted at the outset, a number of nonpublished opinions have dealt with unencumbered no-pornography or no sexually explicit material conditions and have reached varying results.

On this record, however, we need not reach defendant's constitutional challenge, as no one—not the trial court judge, the prosecutor, defense counsel or defendant—*ever* questioned or objected to Officer Kiely's testimony that when he opened the binder, he found "adult pornographic material." Kiely was not asked to further describe the materials. Nor were the materials presented to him or offered into evidence. Defendant's cross-examination focused solely on Kiely's testimony about the syringe and the presumptive methamphetamine in it.

Thus, it is readily apparent that whatever further specificity might be posited with respect to the definition of "pornographic" materials, there was never any question the materials in the binder here *were* pornographic.[5] Even defendant, himself, referred to "the pornographic material." Indeed, instead of complaining he had not understood what he was not supposed to possess, he argued he never should have been subject to the no-pornography condition in the first place because he had never suffered a conviction for any pornography-related crime. We therefore conclude the outcome here would have been no different had the special condition been modified to include more specific language and defendant was not prejudiced in any way by the language of the special condition. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 774 [not deciding whether challenged probation condition was unconstitutionally vague or overbroad, because even assuming it was, defendant's conduct would have violated the condition no matter how narrowly or precisely worded].)

**DISPOSITION**

The parole revocation determination is affirmed.

[5] We note defendant's possession of the materials also violated special condition No. 50, which prohibited defendant from viewing, possessing, or having access to "any material; i.e., periodicals, newspapers, magazines, catalogs, that depict adults or children in undergarments, nude, partially nude, etc."

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Banke, J.

We concur:

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Humes, P. J.

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Margulies, J.